



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ngure v Tear Fund (Employment and Labour Relations Petition  
E156 of 2022) [2023] KEELRC 1324 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1324 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E156 OF 2022  
NZIOKI WA MAKAU, J  
MAY 4, 2023**

**BETWEEN**

**WINFRED NJERI NGURE ..... PETITIONER**

**AND**

**TEAR FUND ..... RESPONDENT**

**RULING**

1. The Respondent/Objector (hereinafter referred to simply as 'the Respondent') raised a preliminary objection dated January 16, 2023. The Respondent's preliminary objection is to the effect:
  - i. That the Petition does not meet the legal threshold for a Constitutional Petition requiring the interpretation and/or application of the Constitution.
  - ii. That the issues raised in the Petition are not Constitutional issues, but are statutory in nature arising from the termination of the Petitioner's employment with the Respondent under the employment contract.
  - iii. That the matter herein is an employment dispute and the alleged violations by the Respondent do not amount to infringement of the Petitioner's rights or fundamental freedoms under the Bill of Rights warranting this Honourable Court to sit as a Constitutional Court.
2. By way of brief background, the Petitioner/Respondent (hereinafter simply referred to as 'the Petitioner') initiated the Petition herein vide her Petition dated August 19, 2022. In it, she asserts various violations of her rights under the Constitution and seeks relief for that and for the said infringements and for wrongful/unfair termination, inter alia. In response to the Petition, the Respondent filed its Grounds of Opposition on September 14, 2022 and the Replying of Affidavit of Lukonde Kapambwe sworn on September 27, 2022 subsequently, the Respondent filed its Notice of Preliminary Objection dated January 16, 2023 as reproduced above.



3. Directions were given on the filing of submissions to dispose of the preliminary objection and the Respondent preceded the Petitioner as directed. The Respondent submits that the sole issue for determination before this Honourable Court is whether the Petition ought to be struck out for failure to meet the threshold of a Constitutional Petition. It was submitted that is now well settled law that a party seeking relief for violation of a Constitutional right or fundamental freedom must plead with a reasonable degree of precision the Constitutional provisions alleged to have been violated and the manner of violation. This was the threshold set in the locus classicus case of *Anarita Karimi Njeru v Republic [1979] eKLR* and which case was reaffirmed by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR*.
4. The Respondent submits that the Petition as drawn is incompetent for failing to satisfy the threshold for a Constitutional Petition set in *Anarita Karimi Njeru*. In this regard, the Respondent submits that the Petition cites Articles 2, 3, 10, 19, 20, 22, and 23 as part of the Constitutional provisions said to be infringed. It is submitted that however, a reading of the said Constitutional provisions do not disclose fundamental rights and freedoms capable of being breached by the Respondent. In addition, the Respondent asserts the Petitioner has not provided the particulars of the alleged Constitutional violations and the manner of violation by the Respondent. The Respondent submits the Petitioner has also not particularized the manner in which the Respondent breached her rights under Articles 25(c), 27 and 28 and that apart from reciting Article 27, the Petitioner has not even attempted to particularize the breach and the manner of violation by the Respondent. It is submitted that likewise, the Petitioner has not particularized with a degree of sufficiency, the manner in which the Respondent violated her rights under Article 25(c) and 28. The Respondent submits that in any event, it is not capable of violating the Petitioner's right under Article 25(c) as the same only applies to accused persons in criminal proceedings and not disciplinary proceedings within an employer-employee context. In this regard, the Respondent relies on the case of *Michael Akoko Mbero v Kenya Revenue Authority [2018] eKLR* wherein this Court held as follows:

' What is material however is that Article 25(c), 57(1) and 50(1) are not applicable to internal disciplinary proceedings under the respondent's code of conduct and therefore could not have been violated by the said disciplinary proceedings. As expressed in the *Constitution*, these provisions relate to criminal trials in a court or tribunal and not private internal disciplinary process.'

5. The Respondent further submits that the issues raised in the Petition do not disclose any Constitutional issues requiring the application and interpretation of the *Constitution*. The rights under Article 41 and 47 alleged to have been violated are enacted in the *Employment Act* and *Labour Relations Act*. Similarly, the rights under Article 31 are enacted under the Data Protection Act. The said Statutory provisions provide adequate redress for the Petitioner and as such, ought to have been the first port of call. In this regard, the Respondent relies on the Court of Appeal decision of *Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR* wherein the Court held as follows:

' We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk* (supra) that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the *Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in *Communications Commission* case (supra). In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the *Constitution*.'



6. It is clear that the Petitioner's grievances stem from her termination of employment and the manner of termination. The fact that the Petitioner alleges that the reasons for her termination were criminal in nature, does not by itself elevate an ordinary employment dispute to a Constitutional dispute. The same does not raise any Constitutional questions warranting this Honourable Court to sit as a Constitutional Court. The allegations of substantive and procedural unfairness of the termination does not amount to a Constitutional violation. In support of this submission, the Respondent relies on the case of David Mathu Kimingi v SMEC International PTY Limited [2021] eKLR wherein the Court relied on the South Africa case of *Petronella Nellie Nelisiwe Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (3) BCLR 251 (CC); 2008 (4) SA 367 (CC) that held as follows:

' In my view it could not have been the intention of the Legislature to allow an employee to raise what is essentially a labour dispute in terms of the Act as a constitutional matter. The Court was categorical that not all issues in an employment dispute are constitutional issues.'

7. The Respondent submits that therefore, the instant Petition is an abuse of the Court process and the same ought to be struck out for failure to meet the threshold established in Anarita Karimi Njeru. The Respondent submits that the issues raised by the Petitioner can be determined as an employed dispute under the *Employment Act* without necessarily invoking this Court's jurisdiction as a Constitutional Court. The Respondent cited the case of *Kyalo & 3 others v Central Church Council (Sued Through William Musyoka Kilunja Being Chairman of Church Board Trustee & 16 others (Petition 4 of 2021) [2022] KEHC 386 (KLR)* wherein the Court relied on the case of *Karuri & others v Dawa Pharmaceuticals Company Limited and others* [2007] 2 EA 235 which case observed as follows:

' Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process.

A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action.'

8. The Respondent submits that based on the foregoing, the Petition herein does not meet the threshold for a Constitutional Petition as it does not disclose any Constitutional issues and the Respondent prays that the Petition be struck out with costs.

9. The Petitioner submits the preliminary objection deliberately seeks to mislead this Honourable Court as to the nature and scope of the Petition. The Petitioner submits that the Respondent grossly violated her fundamental rights and freedom as enshrined in our Constitution in the process of terminating her employment as Lead International Accountant - Donor Compliance. The Petitioner further submits that the Preliminary Objection as filed is devoid of merit and is merely intended to delay the substantive determination of the Petition. The sole issue raised by the Respondent is that the Petition does not meet the "threshold of a Constitutional Petition".

10. It is submitted that in purporting to demonstrate that the Petition does not meet the threshold of a constitutional petition, the Respondent submits, in the Petitioner's considered view, rather evasively on the said proposition and further deliberately seeks to mislead the Honourable Court as to the nature and scope of the Petition. It is submitted that in the first instance, the Respondent alleges that a reading of Articles 2, 3, 10, 19, 20 and 22 cited in the Petition does not disclose fundamental rights and freedoms capable of being breached by the Respondent which is undeniably, a clear misconception as



the Petitioner has cited the said provisions as the legal foundation for the Petition. It is also not legally tenable to urge that failure to abide by the said principles on the part of the Respondent would not amount to violation of the Constitution as sought to be advanced by the Respondent. The Petitioner therefore submits that the objection is not of sound basis as urged by the Respondent.

11. The Petitioner submits that contrary to the Respondent's assertions, the Petitioner has endeavored in Part C and D of the Petition to set out in a rather clear and straight forward fashion the grounds of the Petition and the particularized contravention of the Petition. The Petitioner submits that if the Respondent is unable to decipher the same, it cannot be blamed on the Petitioner and neither can it amount to a ground for attacking the Petition. She submits that the principles set out in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR sought to be relied on by the Respondent have not been fouled by the Petitioner.
12. Additionally, it is submitted that the case of *Michael Akoko Mbero v Kenya Revenue Authority* [2018] eKLR also sought to be relied on by the Respondent has not been fouled by the Petitioner as the Articles 25(c), 57(1) and 50(1) of the Constitution in issue in the matter have not been urged by the Petitioner to have been violated in the instant. The Petitioner submits that we can only therefore view the Respondent's citation of the same as mischievous, consistent with the motive to delay the determination of this Petition on its merits.
13. The Petitioner submits that relying on the case of *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR, the Respondent contends that the Petition does not disclose a cause of action as the rights under Articles 31, 41 and 47 of the Constitution have been legislated upon. The Petitioner submits that this case is clearly distinguishable from the instant matter as the Petitioner additionally urges violation of other rights as well beyond the cited Articles. The Petitioner submits that to purport to lock out a litigant from the seat of justice for not citing statutory provisions that are not the only basis for a cause of action would be a legal absurdity and unjustifiable in a robust constitutional regime such as ours. It is submitted that in any event, legislation only serves to breathe more life into a constitutional edict and not to diminish its application in the society.
14. The Petitioner submits that the foregoing reasons, she does not need to say much on the other two decisions relied on by the Respondent being *David Mathu Kimingi v SMEC International PTY Limited* [2021] eKLR and *Kyalo & 3 others v Central Church Council (Sued Through William Musyoka Kilunja Being Chairman Of Church Board Trustee & 16 others)* [2022] KEHC 386 KLR for being not on fours with the current dispute, which undoubtedly, is beyond being a labour dispute, as it transcends to violation of the Petitioner's rights.
15. The Petitioner submits that whether or not the violation is established is the particularly the factual reasons that the parties are before this Honourable Court for resolution. Relatedly, it is therefore not a question that can be urged as a preliminary point of law as was stated in the celebrated case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Limited* (1969) EA 696 in which Sir Charles Newbold P observed as follows: -

'The first matter related to matters which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all (acts pleaded by the other side are correct. It cannot be raised if any act has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.'



16. The Petitioner submits that she finds little difficulty in reasserting that the Petition is properly before this Court for substantive determination and further find fortification in the provisions of Section 12(1) of the *Employment and Labour Relations Court Act* No 2 of 2011 which delimits the contours of this court's jurisdiction thus:

' 12. Jurisdiction of the court

(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2) of the *Constitution* and the provisions of this Act or any other written law which extend jurisdiction to the Court relating to employment and labour relations including: -

- a) Disputes relating to or arising out of employment between an employer and an employee;
- b) Disputes between an employer and a trade union;
- c) ,'

17. The Petitioner thus urges the Court to accord labour rights the necessary constitutional and legal pedestal that they are and not the rather casual approach that the Respondent appears to have adopted. The Petitioner urges the Court to be persuaded by the dicta of colleague judges Mbaru, Abuodha and Ndolo JJ in *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR* where the Court at Paragraphs 55 and 56 opined thus;

' Labour rights are part of the Bill of Rights by virtue of Article 41 of the *Constitution*. Article 24 of the *Constitution* prohibits the limitation of a right or a fundamental freedom in the Bill of Rights except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."

'Apart from life and land ownership, employment ranks among the most emotive issues in a person's life. Failure to secure a job and/or loss of one has a direct relationship with a person's confidence, dignity and place in society. Prof. Ojwang' J (as he then was) in the case of *Menginya Salim Murgani v Kenya Revenue Authority HCCC No I 139 of 2002* aptly observed as follows:-

'In so far as the employee spends the bulk of his or her time in the service of the employer, there is little other livelihood, in the employee outside the framework of the employment relationship. Of this fact, this Court takes judicial notice; and it must then be considered that the status of employment relationship inherently vests in the employee both normal rights and legitimate expectations.'

18. In conclusion, the Petitioner submits that the Respondent's objection can only be appreciated for its true intent, a mischievous and deliberate attempt to delay the substantive determination of this Petition. She submits that it is therefore devoid of merit and for outright dismissal with costs to the Petitioner.



19. The Respondent takes what the Court deems as a correct exposition as to what a petition alleging constitutional violations entails. In the case of *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR the Court of Appeal held as follows:

' We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk* (supra) that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in *Communications Commission* case (supra). In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution.'

20. The rights alleged to have been violated are capable of being articulated in a normal suit before this Court and granted that there is no particularization of the alleged violations of Articles 3(1), 10(1) and (2), 19(1) and (2), 20(1) and (2), 25(1), 27(1) and (5), 28, 31, 41, and 47(1). Whereas the Constitution of Kenya may well be impacted by the actions of the Respondent herein, not every dispute where there is an infraction of the Constitution elevates said dispute to the threshold for a Constitutional Petition as was filed here. The Court agrees and is persuaded by the preliminary objection that this is not a petition proper. As the Claimant has moved the Court in the form of a Petition and because that is merely irregular, I direct that the Petitioner refile her claim as a normal claim within 14 days of today. There shall be no order as to the costs for the Petition herein.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF MAY 2023**

**NZIOKI WA MAKAU**

**JUDGE**

